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No. 81-2375

IN THE

Supreme Court of the United States

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

(Motion for Reharing Denied, March 8, 1982; Petition for Review by the Arizona Supreme Court Denied, March 30, 1982)

OPPOSITION TO MOTION TO DISMISS

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MEMORANDUM OF LAW

Appellees have not addressed each and every Question Presented in appellant's Jurisdictional Statement. It has long been held that allegations, charges, or questions presented, if not either rebutted or explained with an affirmative defense, are deemed admitted. See *Federal Rule of Civil Procedure 8(d).* Neither proof nor finding is required in support of allegation admitted in pleading. *Mah Toi v. Brownell,* C.A.Cal.1955, 219 F.2d 642, certiorari denied 76 S.Ct. 49, 350 U.S. 823, 100 L.Ed. 735. Also, see *McComb v. Blue Star Auto Stores,* C.C.A.Ill.1947, 164 F.2d 329. See also, *Consolidated Packaging Machinery Corp. v. Kelly,* C.A.Ill.1958, 253 F.2d 49, certiorari denied 78 S.Ct. 1151, 357 U.S. 906, 2 L.Ed.2d 1156.

It is, therefore, respectfully submitted that each and every Question Presented which has not been specifically and definitively addressed by appellees must be regarded by the United States Supreme Court as an *admission* by the appellees.

Instead, appellees have obfuscated the issues presented in the Jurisdictional Statement by erring in their interpretation; and also by creating new alleged "issues" which they purport to be the "issues" that appellees would prefer to have the United States Supreme Court rule upon, rather that the federal questions presented by appellant.

APPELLEES' REASONS WHY THIS COURT'S JURISDICTION HAS NOT BEEN PROPERLY INVOKED

Some of the strange statements found in the Motion to Dismiss are that: "appellant has never drawn into question the validity of a statute of the State of Arizona." See page 5 of Motion to Dismiss for this strange statement. In the Appendix to Jurisdictional Statement on pages 64a and 65a, Violation of Due Process — 7, the validity of a statute of the State of Arizona is questioned. Also, on pages 66a and 67a, Violation of Due Process — 9, the validity of an administrative regulation is questioned. Appellees also state that: "... not even identified the state

statute upon which this Court's purported jurisdiction rests." Strange indeed that appellees are of the belief that the United States Supreme Court, the highest judicial arm of the country, has no jurisdiction over the alleged unconstitutional acts of state courts unless the respective state legislature passes a specific statute granting that jurisdiction. In any case, Article II, Section 3, Constitution of the State of Arizona, cited on pages 2, 3 and 8 of the Jurisdictional Statement, states that: "The Constitution of the United States is the supreme law of the land." Appellees apparently would now deny this Court the right to interpret violations of that Constitution.

Even stranger are appellees' statements of "Appellant's concerns . . ." and ". . . are based on appellant's belief . . ." Appellees have never been engaged or authorized to submit to any judicial authority the "concerns" and "beliefs" of the appellant. This is purely conjecture and rhetoric.

The violation of federal constitutional rights of due process were extensively briefed on pages 11 thru 20 of appellant's Motion for Oral Argument on Appellant's Appeal filed with the Superior Court of the State of Arizona on May 7, 1979 and is a part of the record in this matter.

The twenty federal questions raised by appellant in his Jurisdictional Statement could not be more decisive, pointed, pertinent, concise and detailed. For appellees to state that they could not reasonably ascertain the specific questions which are required to be answered is absurd and is an admission of inability to frame a reasoned alibi or excuse.

FEDERAL QUESTIONS

Appellees on page 6 state that appellant failed to submit the "federal claim or claims" purportedly put in issue and ignored." See Appendix to Jurisdictional Statement, pages 46a thru 76a, which placed the "federal questions" squarely succinctly, concisely and definitively drawn in question upon the Arizona Court of Appeals, and also upon the Arizona Supreme Court.

INTERPRETATION BY STATE COURT OF FEDERAL QUESTIONS

On page 7 appellees allege a "... state court's interpretation of state statutes ..." In this case the state court did not "interpret" any state statute under the violations of due process and violation of free speech submitted. See Motion for Rehearing, pages 46a thru 76a, Appendix to Jurisdictional Statement.

On page 8 appellees formulate, by rhetoric, an erroneous version of the federal question presented. They then embark upon a voyage of pure conjecture after "... assuming, arguendo, that issues had been identified and ruled upon as such in the state court." This is the very gravamen of the problem. The issues submitted by appellant in his Motion for Rehearing, and again those stated in his Jurisdictional Statement, were never ruled upon in the Arizona Court of Appeals or in the Arizona Supreme Court.

APPELLEE'S ALLEGED ISSUES

Appellee's Issue (1), on page 8 of their Motion to Dismiss, was appropriately covered in appellant's federal questions FOUR, FIVE, SIX, SEVEN, EIGHT, NINE, TWELVE, FIFTEEN, SIXTEEN, and NINETEEN of the Jurisdictional Statement. Further elaboration is unnecessary.

Appellee's Issue (2). on page 8 of their Motion to Dismiss, was appropriately coverd in appellant's federal question ONE of the Jurisdictional Statement. Further elaboration is unnecessary. The *true* issue is whether an administrative agency can summarily reject all findings of fact, conclusions of law and reach an opposite decision *not based upon any charge, any allegation, and on any corroborated, unrebutted or unimpeached evidence in the record.*

Appellee's Issue (3), on pages 8 and 9 of their Motion to Dismiss, was appropriately discussed in appellant's federal questions TEN and ELEVEN of the Jurisdictional Statement. Further elaboration is unnecessary.

For appellants, on page 9 of their Motion to Dismiss, to submit to the United States Supreme Court that: ". . . none were sufficiently identified and presented as a federal issue in the state court . . ." is an erroneous representation. See the Motion for Rehearing, pages 46a thru 76a, in the Jurisdictional Statement. They could not have been more clearly, concisely and definitively presented to the state court.

APPELLEE'S PREMISE

Appellee's premise is enunciated on page 9 of the Motion to Dismiss, wherein they aver that their case ". . . rests on an adequate non-federal basis." Thus, they summarily dismiss violations of federal and state constitutionally guaranteed rights of due process and free speech as being non-federal in nature. An amazing argument.

SCOPE OF ADMINISTRATIVE REVIEW

Appellee's argument is based upon the proposition that judicial interpretation by a state court cannot, by definition, be unconstitutional in its application. They assert that any act of a state judiciary must be "based upon a federal constitutional provision." Appellant submits that not only is their argument without merit but that appellees in all briefs submitted and in their oral arguments below did not support the ambiguous "reasonable evidence" standard but, instead, argued before the Superior Court and in their briefs to the Arizona Court of Appeals that "any evidence" was sufficient. It is noted that:

> "In approaching the question of substantiality of evidence, "any evidence" is not substantial evidence and bare conclusions, without supporting facts, are not substantial evidence; "substantial evidence" is valid, legal and persuasive evidence." *Pickens-Bond Const. Co. v. Case*, Ark., 584 S.W.2d 21, 25.

The final paragraph of Question Presented No. FIFTEEN, pages 20-22, Jurisdictional Statement, cites the constitutional provision violated.

Appellees cite *Board of Education of Tempe Union High School v. Lammle* in support of their lesser standard of "reasonable evidence. However, they neglect to inform the United States Supreme Court that: (1) this case was decided on April 10, 1979, over eighteen months *after* the evidentiary hearing was conducted and after the Personnel Board conducted its Open Meeting, during which time the law was that of "substantial evidence." (2) the "substantial evidence" rule was established by the highest state court, the Arizona Supreme Court, and not by the lower Court of Appeals. (3) The Arizona Supreme Court had not yet revised its standard of "substantial evidence" nor had either of those two courts held that any "reasonable evidence" standard would be *retroactively* effective. (4) Neither Court has yet set the standards for "reasonable evidence" nor has the legislature. (5) The United States Supreme Court has held on numerous occasions that the "substantial evidence" rule is required. See citations in Jurisdictional Statement.

Appellant has repeatedly asserted and identified the violation of his due process rights under the Fourteenth Amendment by making a lesser degree of evidence, without defining that degree of evidence, and without specifying that evidence, as making such a standard repugnant to the Constitution of the United States.

STATE PERSONNEL BOARD MAY REVERSE THE FINDINGS OF ITS HEARING OFFICER PROVIDED THAT IT IS DONE WITH A PREPONDERANCE OF EVIDENCE TO SUPPORT SUCH A REVERSAL AND WHEN THEIR FINDINGS ARE SUPPORTED BY CORROBORATED, UNREBUTTED OR UNIMPEACHED EVIDENCE; AND WHEN IT MAKES FINDINGS THEY ARE BASED ON CHARGES, ALLEGATIONS, TESTIMONY OR EVIDENCE IN THE RECORD.

Appellees have erred in representing appellant's position. Appellant has repeatedly submitted that the State Personnel Board has the power, authority and responsibility to reverse the findings of its Hearing Officer PROVIDED THAT it is done

when there is a preponderance of evidence to support their reversal; and PROVIDED THAT the preponderance of evidence is not based upon uncorroborated, rebutted or impeached evidence or testimony; and PROVIDED THAT there are charges, allegations, testimony and evidence in the record to support their reversal.

Appellees have also erred in representing appellant's position vis-a-vis the rules and regulations adopted by the Personnel Board. Appellant merely submits that when any rule or regulation, or portion thereof, is formulated without the specific authority of statute, or when it goes beyond the statute to expand powers not granted by statute, then that which has been promulgated by the Personnel Board beyond the powers granted by the legislature is null and void and is an *ultra vires* act.

The twenty federal questions presented in the Jurisdictional Statement are not solely applied to interpretation of state statutes and state agency regulation as appellee has submitted. They are addressed to violations of constitutionally protected rights of due process and free speech. However, appellant submits that appellees are in error when they state that "Interpretation of state statutes and state agency regulation is reserved to the appellate courts of the state, not to the federal courts." This bold assertion claims immunity of the state judiciary from the provisions of the United States Constitution. It is respectfully submitted that no such immunity exists. When state courts violate constitutionally protected rights of the citizen, the United States Supreme Court has the power, the responsibility and the duty to reverse such violations.

Appellees continually misrepresent appellant's position. Appellant has repeatedly submitted that the State Personnel Board has the power, authority and responsibility to reverse the findings of its Hearing Officer PROVIDED THAT it is done when there is a preponderance of evidence to support their reversal; and PROVIDED THAT the preponderance of evidence is not based upon uncorroborated, rebutted or impeached evidence or testi-

mony; and PROVIDED THAT there are charges, allegations, testimony and evidence in the record to support their reversal — not mere adversarial rhetoric.

"IMPROPER ATTITUDE" WAS IDENTIFIED AND LITIGATED IN THE STATE COURT.

The charge "improper attitude" was completely identified and litigated in the written briefs submitted by both parties to the Superior Court of Arizona. See pages 21 thru 48 of Appellant's Motion for Oral Argument on Appellant's Appeal filed with the Superior Court of the State of Arizona, dated May 7, 1979, and a part of the record in this matter.

Appellees failed to address this point in their oral argument, and now feel that, because of their failure to address this point in oral argument, they are now entitled to state that the subject was not litigated. Such was not the case. They had ample opportunity in their written briefs, which they took advantage of. Their failure to include this subject in their oral argument was entirely of their own choice and volition. They cannot now cry "we forgot to include this point in our oral argument, therefore it was not litigated."

It must also be noted that the highest court of the state did *not,* as averred by appellees, fail to pass on appellant's "federal questions" and overrule the Superior Court strictly on its interpretation of state law and authority. The highest court of the state is the Supreme Court of Arizona. It did not address any part of the issues; it summarily denied a petition for review without reviewing the complete record. Thus it was a lesser appellate court that overruled the Superior Court.

Insofar as *Arnett v. Kennedy,* cited by appellees, it must be noted that the State of California, in the leading case of *Skelly v. State Personnel Board,* 15 Cal.3d 194, 124 Cal.Reptr 14, at 28, 539 P.2d 774, applied the general principles of *Arnett v. Kennedy,* and after distilling the various opinions of the six justices of the Supreme Court of the United States, held that the

provisions of the California Personnel Act (which was virtually identical to the present Arizona Personnel Act, which was patterned upon the California Personnel Act) concerning the taking of punitive action against a permanent civil service employee did not fulfill minimum constitutional demands. The California Supreme Court held:

> "It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." *Skelly v. State Personnel Board,* 124 Cal.Reptr 14, at 28-29.

It must be noted that one of the defenses of the appellant herein are that the record reveals that the preremoval safeguards were not complied with by the State of Arizona.

The First Amendment issue of free speech was thoroughly briefed before the Arizona Superior Court on pages 31-33 (FINDING OF FACT NO. 4) and on page 44 (CONCLUSION OF LAW NO. 4) of Appellant's Motion for Oral Argument on Appellant's Appeal filed with the Superior Court of the State of Arizona in and for the County of Maricopa, dated May 7, 1979. This brief was filed in both the Arizona Court of Appeals and in the Arizona Supreme Court as an Appendix to Appellee's Answering Brief (Appellant herein).

Finally there was no corroborated, unrebutted or unimpeached testimony in the record that appellant openly expressed attitudes of misuse, criticism, and hostility that were inconsistent with a workable employee relationship and that were highly disruptive to the agency. This is imaginative rhetoric. Judge Ellis M. Kopp, former U.S. Federal District Judge from New Jersey, after eight

days of evidentiary hearing found (See page 16a, REASON 6, of Appendix to Jurisdictional Statement) that the author of this statement testified while under oath "everything that I have heard or seen of his ability as a hearing officer was exempletory." (sic) There was no critical expression introduced in the record that could have undermined the effectiveness of the agency, which crossed the line from protective speech to disruptive attitude. This again is imaginative rhetoric, and no such critical expression in that degree was cited by the trier of fact former U.S. Federal District Judge Ellis M. Kopp at the evidentiary hearing; nor did present U.S. Federal District Judge Charles M. Hardy find so at the Superior Court level when he heard the case on appeal.

SUMMARY

Appellees' Motion to Dismiss is so far removed from the Jurisdictional Statement as to preclude any viable review of it by the United States Supreme Court. The "federal questions" raised were not addressed by appellees; and thus, if no answer be filed, every relevant and material "federal question" raised in the Jurisdictional Statement is at issue.

Finally, the shallow reasoning that violations of federal constitutionally protected rights of due process and free speech is permissable because the provisions of state statutes are immune to judicial review by the United States Supreme Court is the height of absurdity. Appellees' arguments are without merit.

CONCLUSION

For the above reasons this Court should note jurisdiction of this appeal.

Respectfully submitted,

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